United States Court of Appeals

for the Second Circuit

APPENDIX

74-1401

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel. LARRY JOHNSON,

Petitioner-Appellee,

against

LEON J. VINCENT, Superintendent of Greenhaven Correctional Facility, Stormville, New York,

Respondent-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX

LOUIS J. LEFKOWITZ
Attorney General, State of New York
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249 Press of Fremont Payne, Inc., 417 Canal St., N. Y.—966—6570

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Docket Entries.

U.S.A. ex rel. LARRY JOHNSON v. LEON J. VINCENT, etc.

DATE	PROCEEDINGS
Feb 13-72	Filed Petition for Writ of Habeas Corpus.
Feb 13-72	Filed ORDER—Ordered that petitioner be permitted to proceed in forma pauperis with prepayment of fees. TYLER, J.
Feb 5-73	Filed ORDER.—Ordered that the respondent's time to reply to the petition herein be extended from 3-5-73 to 3-26-73 per Rule 6(b)(1). FRCP. WARD, J. (mn)
Mar. 28-73	Filed affd't. in opposition to petitioner's application for writ of habeas corpus.
Mar. 12, 73	Filed petitioner's reply affidavit (traverse).
Mar. 12, 73	Filed Notice of Assignment to JUDGE BAUMAN.
Sep. 19-73	Filed order to show cause for writ of habeas corpus, pursuant to Title 18, U.S. Code 2254. Ordered that John J. Tigue, Jr. of 52 Wall St. be appointed to represent petitioner. Ret. 9-21-73, 9:30 A.M., Room 1305.
Sep. 18-73	Filed affdvt of John J. Tigue, Jr. for writ of habeas corpus ad testificandum.
Nov. 7-73	Filed affidvt for writ of habeas corpus and testificandum—Writ satisfied—Bauman, J.
Nov. 8-73	Filed authorization of court reporters, Southern District.
Nov. 19-73	Filed affdvt. for writ of habeas corpus, Writ satisfied. BAUMAN, J.
Jan. 30-74	Filed transcript of record of proceedings dated Sept. 28-73.
Jan. 30-74	Filed transcript of record of proceedings dated Oct. 12-73.

Docket Entries.

DATE	PROCEEDINGS
Jan. 30-74	Filed petitioner memo of law.
Jan. 30-74	Filed respondent post-hearing memo of law.
Jan. 30-74	Filed OPINION #40301—* * *Granting of the writ must do no more than restore his right to appeal. The appropriate procedure, then, is to vacate the judgment of conviction and remand the petitioner for resentencing *nunc pro tunc* upon the verdict already rendered. * * * The judgment of the Supreme Court, Bronx County, is hereby vacated. BAUMAN, J. (notice mailed by Pro Se).
Feb. 26-74	Filed deft. notice of motion to stay order of this Court dtd. 1-30-74 and MEMO END. Motion granted. So Ordered. BAUMAN, J. (n/m)
Feb. 26-74	Filed affdvt. of John J. Tigue in oppostiion to respondent's motion.
Feb. 26-74	Filed respondent's notice of appeal from an order of this court dtd: Jan. 30-74, vacating judgment of conviction and remanding him for resentence *nunc pro tunc* so that he may pros. another direct appeal. m/n.

Petition for Writ of Habeas Corpus.

STATE OF NEW YORK }
COUNTY OF DUTCHESS } ss.:

PLEASE TAKE NOTICE, that upon the annexed petition, petitioning for a writ of habeas corpus under title 28, section 2242, the undersigned will move before this Honorable Court; U.S. District Court house for the Southern District of New York, Foley Square N.Y. on the 2 day of March, 1973, at 10:00 o'clock in the forenoon of that day or as soon thereafter so that this motion can be heard for a plenary hearing, and for such other and further relief as the Court may deem just and proper.

Respectfully submitted,

LARRY JOHNSON

(Sworn to by Larry Johnson, February 2, 1973.)

Motion in Forma Pauperis Title 28, Section 1915 (A) U.S.C.

STATE OF NEW YORK }
COUNTY OF DUTCHESS } ss.:

LARRY JOHNSON, being duly sworn deposes and says: That he is the above named petitioner, and submits this affidavit for leave to proceed in forma pauperis.

Being without funds or securities and no other means to pay the cost thereof in these proceedings seeking a hearing. Therefore, the petitioner declares himself a pauper in accordance with Title 28, section 1915 (A) U.S.C. That he is requesting of this Honorable Court to grant him permission to proceed in forma pauperis.

Respectfully submitted,

LARRY JOHNSON

(Sworn to by Larry Johnson, February 2, 1973.)

Motion for a Writ of Habeas Corpus Title 28 Section 2242 U.S.C., Petition for a Plenary Hearing.

STATE OF NEW YORK }
COUNTY OF DUTCHESS } ss.:

LARRY JOHNSON, being duly sworn, deposes and says:

1. That he is the above named petitioner of these moving papers and states: That he is a citizen of the United States, over 21 years of age.

2. That he is presently being held by the above respondent at Greenhaven Correctional Facility, Stormville, New York.

3. Petitioner was indicted for murder. The trial was had in the County of Bronx, before Hon. Charles G. Tierney and a jury, from November 24, 1969 to September 11, 1969. On September 11, 1969 the jury returned a verdict of guilty of murder against the petitioner. Thereafter on the 23rd day of January 1970, he was sentenced to a minimum term of 15 years with a maximum of life imprisonment.

4. Petitioner perfected an appeal to the Appellate Division for the First Judicial Department. That appeal was denied on December 9, 1971. On January 25, 1972 the Court of Appeals denied petitioner leave to appeal.

5. On July 17, 1972 he submitted a motion to vacate judgment to the Bronx County Supreme Court. That motion was denied with a decision on September 5, 1972. Afterwards, an application to the same Court, titled "TRAVERSE" which included additional contentions of denial of due process under the fourteenth amendment, was also denied.

Motion for a Writ of Habeas Corpus Title 28 Section 2242 U.S.C., Petition for a Plenary Hearing.

6. On September 7, 1972 the petitioner submitted an application to Justice of Appellate Division for certificate granting leave to appeal to the Appellate Division, and on October 31, 1972 certificate was denied. He then requested for permission to appeal to the Court of Appeals, and was advised that there was no applicable provisions under the Criminal Procedure Law to afford him redress.

Cause of confinement having been shown; this is not a show cause writ. The petitioner is seeking a plenary hearing.

QUESTIONS OF LAW PRESENTED

7. At petitioner's trial in the present case his attorney, Mary Lowe, requested that the Court charge the jury regarding the lesser included crime of assault, a lesser included offense. The Court denied this request, an exception taken and duly noted. (See transcript pp. 619-626 attached hereto as Exhibit A.)

8. The petitioner contended that the refusal of the trial court to charge assault, a lesser included offense, when requested by petitioner's trial counsel, is reversible error.

9. This ground was not asserted upon appeal, but such failure to seek an appellate determination was not due to petitioner's unjustifiable failure.

10. Petitioner applied to the Columbia Law School for post-conviction assistance. Steven L. Baumohl, a law school graduate employed by Columbia Law School Green Haven Prison Project spoke to Lawrence Zamzok, petitioner's counsel on appeal (See Exhibit B, Affidavit of Steven Baumohl). Mr. Zamzok told Mr. Baumohl that the issue of the trial court's failure to charge the jury with

assault was never raised on appeal because he, Mr. Zamzok, read the trial transcript as being barren of a request to so charge. However, the trial transcript (pp. 619-626) indicates that the request was made.

11. Perry Ford was indicted along with petitioner in the present case. Mr. Ford was severed from the case when he pleaded guilty to another crime, such plea covering the present indictment. Mr. Ford, who was incarcerated at Green Haven, has informed petitioner that prior to being severed, he made a statement to Irving J. Goldsmith, the Assistant District Attorney in the present case, which fully exculpated petitioner of the crime of which he was subsequently convicted. Mr. Ford's affidavit is attached hereto (See Exhibit C).

Neither petitioner nor petitioner's trial counsel was ever aware of Mr. Ford's statement.

12. The suppression by the Assistant District Attorney of Mr. Ford's exculpatory statement has denied petitioner a fair trial in violation of his rights and merits vacation of the judgment against him. *Giles* v. *Maryland,* 386 U.S. 66, 87 S.Ct. 793, 17 L.Ed. 737 (1967). *Brady* v. *Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963).

Argument

As the petitioner is relying on Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed. 2d 770 (1963), it is his contention that: the fact finding procedure employed by the state was not adequate to afford him a full and fair adjudication of the instant issues. At no time was he afforded a hearing.

The state court claimed that the affidavit of a highly skilled lawyer of unimpeachable integrity and ethical

standards as being: "Pure hearsay." However, this was never proven.[1]

Notwithstanding the fact that the petitioner is serving a lengthy sentence, it would seem that it would have been in the interest of justice that every rock, pebble, niche and crevice should have been scrutinized to the fullest extent. The court goes on to say that:

> "The issue raised by Ford's affidavit was the subject of a motion to set aside the verdict and was decided adversely to the defendant by the trial justice (Tierney, J.), in an order entered on November 10, 1971. The order was affirmed on appeal (38 AD 2d 629). This determination is a bar to the instant claim. . . ."[2]

With all due respect, the petitioner is compelled to state that the Hon. Justice Fein's decision is gravely in error. The affidavit of which Justice Fein refers to did not pertain to the issue of suppression of evidence. To the contrary, it emphasized the petitioner's nonparticipation in the crime and was totally void of the issue pertaining to suppression of evidence.

The court goes on to say in regard to the lesser included offense:

> ". . . Such alleged trial error is not of constitutional dimensions. It does not come within the scope of post-conviction relief. The trial court explained the reasons for refusing to charge the request."[3]

However, under federal rule, defendant may be found guilty of a lesser included offense and he is entitled as

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[1] See affidavit of Steven Baumohl.

[2] See decision of Hon. Arnold L. Fein, dated September 5, 1972.

a matter of right to a charge to jury to that effect whether or not the government agrees to it. Fed. Rules Crim. Proc. Rule 31 (c), 18 U.S. C.A. *U.S.* v. *McCue,* 160 F.2d Sup. 595.

When some of the elements of the crime charged themselves constitute a lesser crime defendant, if the evidence justifies, is entitled to an instruction which will permit a jury to find him guilty of the lesser crime. *Olais-Castro* v. *U.S.C.A. Cal. 1969,* 416 F.2d 1155. As the petitioner has shown justifiable failure for not raising these issues on direct appeal, it is his hope that in the interest of justice the Court will grant him a plenary hearing.

Conclusion

It would seem that if the lower court was sincerely concerned with the interest of justice, and in view of the petitioner's lengthy sentence (15 years to life), it could have at least made a meaningful attempt at trying to resolve these issues. However, the circuitous and unfair manner in which the petitioner was denied, serves to show that the lower court has been most successful in frustrating all of the supposedly noble intentions of justice. A hearing should have been had. It should have been had for the purpose of seeking the truth. Therefore, for the above stated reasons, a hearing should be granted and the judgment of conviction should be reversed and dismissed.

Respectfully submitted,

Larry Johnson

(Sworn to by Larry Johnson, February 2, 1973.)

Motion for a Writ of Habeas Corpus Title 28 Section 2242 U.S.C., Petition for a Plenary Hearing.

CASES CITED IN THE STATE COURT

I. Motion to vacate judgment in regard to lesser included offense:

a. *People* v. *Mussenden,* 308 N.Y. 558 (1955).

II. Suppression of evidence by the District Attorney:

a. *People* v. *Cotto,* 29 A.D. 536, 285 N.Y.S. 2d 247 (1st Dept. 1967).

III. Cases cited in Traverse:

a. *People* v. *Eastman* (1965), 46 Misc. 2d 674, 260 N.Y.S. 2d 498; *People* v. *Shapiro,* 3 N.Y. 2d 203, 205, 165 N.Y.S. 2d 14, 15, 144 N.E. 2d 10, 11; *People* v. *Silverman,* 3 N.Y. 2d 200, 202, 165 N.Y.S. 2d 11, 12, 144 N.E. 2d 12, 13.

b. *Giles* v. *Maryland,* 386 U.S. 66, 87 S.Ct. 793, 17 L.Ed. (1967); *Napue* v. *Illinois,* 360 U.S. 264 (1959); *Miller* v. *Pate,* 386 U.S. 1 (1967); U.S. ex rel. *Meers* v. *Wilkins,* 326 F.2d 135 (1964); *Brady* v. *Maryland,* 373 U.S. 83 (1963).[1]

STATUTE

IV. The Court was authorized to grant the requested relief.

a. Section 440.10, subdivisions 1(b), 1(f) and 1(h) of the Criminal Procedure Law.

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[1] These cases were cited in support of "Additional Contention"; Denial of Due Process Under the Fourteenth Amendment.

Affidavit of Service.

I, LARRY JOHNSON, 17156 being duly sworn deposes and says: That he has placed in the hands of the notary public six (6) copies of a writ of habeas corpus to be notarized and forwarded to the following parties:

(1) One original and two (2) carbon copies to the United States District Court, Southern District of New York, U.S. Court House—Foley Square, New York, N.Y. 10007.

(2) To Louis J. Lefkowitz (one copy), Attorney General of New York State, 80 Centre Street, New York, N.Y. 10013.

(3) One copy to the warden of this institution Leon J. Vincent, Drawer B. Stormville, New York 12582.

(4) And one copy remains in the hands of the petitioner.

Petitioner in person
LARRY JOHNSON
LARRY JOHNSON #17156

(Sworn to by Larry Johnson, February 2, 1973.)

Exhibit A, Proceedings.

People of the State of New York v. Larry Johnson a/k/a Larry White

Court did this intentionally.

The Court: Of course not.

Mrs. Lowe: And the page I was reading from in the record is page 459. Now, of course, I take exception to that portion.

The Court: Surely. I decline to charge any further on this.

Mrs. Lowe: Now, I also take exception to the charge of the Court when it referred to the intent and the common enterprise, it did not clearly state to this jury that they could not consider that the intent that resulted in the assault upon the deceased in the apartment or the common enterprise that may have given rise to the assault on the deceased in the apartment is the intent and common enterprise that must be found to convict these defendants of murder and in view of the fact that there is a —there is a very strong proof that the defendants did engage in an assault pursuant to a common enterprise to find out from Chambers where the coat—where the things that were stolen from Ford's apartment, that that intent and that enterprise is not the intent and enterprise that is a requisite for finding guilt of murder and I believe the jury does not understand that and I request the Court to charge the jury clearly that the intent necessary to act in concert to find out where Larry—where Perry Ford's clothing was and the result of the assault on Chambers inside that apartment should be clearly distinguished from an acting in concert for the purpose of murdering Perry Ford—I mean murdering Nicholas Chambers.

The Court: In summarizing the evidence, the Court summarized the testimony of all the witnesses and that is

the testimony that is the evidence which this jury will deliberate upon and whatever occurred in the apartment prior to the time they left the apartment and started upstairs surely was an assault but all of that is merged in this circumstantial evidence and intent of the whole proceeding from beginning to end and it's not like taking separate blocks and putting them all together and charging the separate blocks. You take all the blocks together as the evidence and charge—in charging the one crime. And I'm not going to charge separate counts here of assault because murder in itself is an assault with—and that's what I have before me.

Mrs. Lowe: I'm saying that the act that took place in the apartment an act of assault is not the assault that would merge in the homicide—

The Court: I decline to charge. First of all, there is no such charge in the indictment. I find anything that occurred prior to what you are talking about is not independent, it's merged in and part of the evidence to spell out intent, circumstantial evidence and the whole ball of wax leading up to acting in concert to commit a crime.

Mr. Goldsmith: Even if what transpired in the apartment, the assault of the deceased in the apartment, if it was not part of the homicide then it's a separate crime for which they haven't been indicted. And your Honor couldn't charge—

Mrs. Lowe: And that's—

Mr. Goldsmith: If it was merged, if it was merged, if the assault was—that was involved in the crime and it is merged then you surely don't charge assault.

The Court: I decline to charge it.

Mrs. Lowe: But, Judge, the point that Mr. Goldsmith made was exactly the point I was trying to bring out that the jury should be told that if they find as to either of these defendants that—committed an assault that assault was not charged in this indictment.

Mr. Goldsmith: The Judge can't do that.

Mrs. Lowe: You say he can't. The Judge has declined, that's all right.

The Court: That would have to be done at an earlier time by motion and not at this time in this case.

Mrs. Lowe: That's all I wanted to say on the record, Judge. I'm satisfied it's in the record.

The Court: Before we got to where we are now, where the Court is conferring with counsel on the subject of any exceptions to the charge and I take it we are also taking any requests to charge.

Mrs. Lowe: Yes.

The Court: First, will you answer my first—are there any exceptions to the charge? What portion of what you have here is an exception?

Mr. Goldsmith: People have no exceptions.

Mrs. Lowe: I except to the Judge's charge on the question of intent to act in concert and intent to commit the crime of murder on the ground that it is confusing for the reason that you have an intent expressed in this record to assault for one purpose and the People allege they have claimed also an intent to murder for quite a different purpose, and I say that this jury is confused by the charge of his Honor on that section dealing with intent and dealing with acting in concert.

Mr. Lopilato: I join in this exception.

Mrs. Lowe: That's it.

The Court: Those are the exceptions, and I believe the other matters that we discussed are in the nature of requests to charge, request of the Court to charge assault separately?

Mrs. Lowe: Or to inform the jury as we have set forth in the record which the Court has declined.

Mr. Lopilato: I have one request.

The Court: I decline to charge.

Mr. Lopilato: I join in her motion also.

The Court: I decline to charge on that subject.

Exhibit A, Proceedings.

Mr. Lopilato: If you find the defendants had abandoned the crime so charged, acting in concert and so forth—

Mr. Goldsmith: What defendant abandoned?

Mr. Lopilato: Both defendants. They say they went downstairs.

Mr. Goldsmith: Who is they? Who is they?

Mr. Lopilato: Scatter and—

Mr. Goldsmith: Larry didn't say anything.

Mr. Lopilato: If you find Scatter left and went downstairs before the crime was committed.

Mrs. Lowe: In other words—

The Court: That's only the testimony—

Mrs. Lowe: If the evidence, if the jury believes beyond a reasonable doubt that either or both of the defendants did—abandoned whatever—

Mr. Lopilato: Acting in concert.

Mrs. Lowe: No, when you say acting in concert—

Mr. Lopilato: Abandoned.

Mr. Goldsmith: Abandoned what?

Mr. Lopilato: The crime.

Mr. Goldsmith: You had better put it in writing.

The Court: I will let the jury recess and you can put it in writing. I will let them recess for a few minutes, not for lunch. We will take ten minutes, not to deliberate.

(The following transpired on open court:)

The Court: Mr. Foreman and gentlemen of the jury: There is one matter that the Court still wants to take up with counsel; so I'm going to allow you to be in recess for just a few minutes; and during that few minutes, do not speak to each other about this case. You are not deliberating yet. Do you understand that gentlemen? You'll just be in recess for a few minutes. Then the Court may or may not have another matter to take up. Then you'll be in recess for lunch; and after your lunch you will then begin to deliberate.

So do not discuss this case among yourselves in any

shape, manner or form at this time or during lunch; do you understand, gentlemen?

(Jurors nod.)

The Court: You may step out for just a few minutes, please.

(Jurors excused.)

(Mrs. Lowe, Mr. Goldstein and Mr. Lopilato confer with the Court at the bench.)

(Whereupon a short recess was declared.)

AFTER RECESS:

The Court Clerk: Case on trial continued. Defendants, respective counsel, assistant district attorney present.

(Jurors not present.)

The Court: Miss Lowe, you had a request to the Court to charge?

Mrs. Lowe: Yes, your Honor. May it please the Court, the defendant requests your Honor to charge the jury on criminal facilitation in the first degree, Section 110—115.05 of the Penal Law.

The Court: I believe your argument with respect to this request would be similar to the argument which you advanced with the request to charge in connection with the crime of assault; is that correct?

Mrs. Lowe: That's correct, sir.

The Court: The Court declines to charge. You have an exception.

Mrs. Lowe: Thank you.

Mr. Lopilato: On behalf of the defendant, Boyce Thompson, there is no request for charge.

The Court: No request to charge?

Mr. Lopilato: No, sir.

The Court: Okay. The Court has considered the testimony given before the defense by the witness, Boyce Thompson, wherein he testified with respect to what he saw Larry Johnson do at a time at the fourth-floor landing,

Exhibit B, Affidavit of Steven L. Baumohl.

STEVEN L. BAUMOHL, being duly sworn, deposes and says:

1. That he is a June 1972 graduate of Columbia University School of Law.

2. That during the month of June 1972, he was employed by the Columbia Law School Green Haven Prison Project.

3. That in the course of reviewing Larry Johnson's application for assistance from the Columbia Law School Green Haven Prison Project, he spoke with Lawrence P. Zamzok, Esq., Mr. Johnson's appellate counsel.

4. That Mr. Zamzok said that the reason he never raised the issue of the trial court's failure to charge assault as a lesser included offense on appeal was that he felt that a request for such charge was never made.

STEVEN L. BAUMOHL
Steven L. Baumohl

(Sworn to by Steven L. Baumohl, July 5, 1972.)

Exhibit C, Affidavit of Perry Ford.

PERRY FORD, being duly sworn, deposes and says:

1. He is presently incarcerated at Green Haven Correctional Facility, Stormville, New York.

2. He was indicted along with Larry Johnson and Boyce Thompson in the case herein described.

3. Prior to the trial of said case he pleaded guilty to another indictment which covered the indictment in this case and was thus dropped as a co-defendant.

4. Prior to the trial of the case herein described, he made a statement to Irving J. Goldsmith, the prosecuting Assistant District Attorney in said case fully exculpating petitioner Larry Johnson from the murder of Nicholas Chambers, the crime of which petitioner was subsequently convicted.

PERRY FORD
Perry Ford

(Sworn to by Perry Ford, July 17, 1972.)

Affidavit of Perry Ford.

STATE OF NEW YORK }
COUNTY OF DUCHESS } ss.:

PERRY FORD, being duly sworn, deposes and says:

I make this affidavit in explanation of the facts and circumstances surrounding a statement I made to assistant District Attorney Irvin Goldsmith in his office during the month of October 1969, in which I exculpated Larry Johnson and Boyce Thompson from having taken part in the death of Nick Chambers.

During the month of October 1969, I was brought along with many other inmates to the Bronx Supreme Court Building, 851 Grand Concourse Bornx, New York. After arriving, we were unboarded, and as usual brought up stairs to be placed in a waiting room, where individually our names were called out, in which we had to reply to by giving our addresses. When my name was called, I replied in the required manner, and was then told by a correctional officer who appeared to be in my estimation a sargent, as he wore a white shirt, to step out of the room. Following his instructions, I stepped out of the room and was confronted by a plain-clothed officer who was wearing a badge on his coat who hand cuffed me once again and told me: Come along.

I asked the officer where was he taking me, and was told: Someone wants to speak to you. Eventually, I ended up in the office of District Attorney Goldsmith; I was offered a pack of cigarettes by Mr. Goldsmith of which I refused.

Mr. Goldsmith then asked me if I knew why I was there. I told him I didn't. He then said that Larry Johnson and Boyce Thompson would be starting trial soon, and that he was planning on calling me as a witness, but that he wanted to know what transpired on the roof

on the 14th of December 1968, and that if I was willing to co-operate that he would, depending on what I had to say, make a recommendation to the judge for me when my sentencing date would arrive, and that it would be more than possible that the judge would take any recommendation he made into consideration.

I told him I could tell him what happened on the night in question, and that that was all I could do. He then asked me to relate to him what happened. I began to explain to him in so many words that, the cause of Nick Chambers falling from the roof was an accident, and that Larry Johnson was not even on the roof when this occurred. I told him that the discrepancy was between Nick Chambers and I, and that Larry Johnson had nothing to do with it. I explained to Mr. Goldsmith that, Nick Chambers and I was struggling, and as a result of that struggle, Nick Chambers accidently went off of the roof.

But Mr. Goldsmith kept telling me that Linda West said this and that Van Hook had said something else, and that everything I was saying concerning the apartment and as to what took place in it was contrary to what they had said.

I told him: Mr. Goldsmith, Larry Johnson was never on the roof that night, those people lied to you; no one else was involved. He then told me that he thought I was being foolish, and that he thought that I had enough sense to take advantage of an opportunity to help myself. Soon afterwards, I was taken back down stairs.

(Sworn to by Perry Ford, July 17, 1972.)

Petitioner's Traverse.

STATE OF NEW YORK }
COUNTY OF DUTCHESS } ss.:

LARRY JOHNSON, being duly sworn, deposes and says:

That he is petitioner in the above entitled action, and that he submits this Traverse in rebuttal to the Attorney General's opposition.

The petitioner wishes to emphasize that he is purely before this Court for the purpose of obtaining due process of law, which is afforded to him under the fourteenth amendment of the constitution of the United States of America, that was to him in the lower courts denied.

That he requested of the state court to vacate his sentence in order that he could appeal an issue that was not raised on direct appeal by assigned counsel, and that the nondisclosure of evidence by the prosecution denied him due process, as it was admissible and useful to the defense. Thus, the gist of the argument must be focused on the question of whether petitioner's rights has indeed been violated.

That the Attorney General, as the District Attorney before him, is merely trying to cloud the real issues with constant repetion (sic) of a host of irrelevant matters.

That having exhausted all possible state remedies, the petitioner had no other alternative, but to bring these issues before this Court. And according to the rules laid down in *Townsend* v. *Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed. 2d 770, the petitioner is properly before this Court. The Court stated in the above case:

> ". . . the language of congress, the history of the writ, the decision of this court all make clear that the power of inquiry on federal habeas corpus is plenary. Therefore, where an applicant * * * alleges facts which, if proved, would entitle him to relief,

the Federal Court * * * has the power to receive evidence and try the facts anew."

According to the States (sic) own statute (See CPL 440.10 (2)b.), the court was authorized to grant the requested relief, but refused to do so. In view of the fact that the petitioner submitted valid affidavits to support his claims, and that affidavits were offered in opposition, then the question of which ones supports the truth, should be one of the primary issues. This is why a hearing should have been had. This is why a hearing should be had, for the truth is only found through seeking.

The Attorney General stated that: "A trial judge is only required to instruct the jury on a lesser included offense if there is some *evidentiary basis* on which the jury might find the defendant innocent of the higher crime charged, but guilty of the lesser included offense." However, as this was a highly circumstantial case, the refusal of the trial judge to charge the jury with the lesser offense is to say that, the trial judge was limiting the jury from performing its duties. For if we are to believe the People's witnesses, the defendant committed an assault on the deceased, in the apartment of Linda West. If this testimony was allowed into evidence by the trial judge, and in light of the fact that this was a circumstantial case, then the jury was entitled to decide for themselves whether the defendant was guilty of the greater or lesser offense.

Perry Ford wrote a post-trial letter (See Appellant's brief on direct appeal P. 9), in which he exculpated petitioner of taking part in the death of the deceased, nevertheless, the court ruled that the letter, which was an independent confirmation of a vital fact, was insufficient. This letter was written from the city prison on Riker's Island where Ford had been detained prior to and after petitioner's

trial. But the state court, the District Attorney, and the Attorney General would have this Honorable Court believe that he was detained in the Men's House Of Detention along with the Petitioner, which is untrue.

It was not until the petitioner was transferred from another prison that Ford informed him that he had made a statement to the District Attorney. The only explanation that the petitioner can suggest for Ford's failure to raise this issue in his first papers is that, like many of us, he is not a lawyer. But here is an excerpt from Mr. Ford's first affidavit that should indicate the lower court's unwillingness to afford the petitioner with justice: "I didn't kill Nick deliberately and really didn't care one way or another about his death.

I would only like the chance to keep two people from being locked up for something they didn't do. I would also like to tell this in open court before it is to late. . . ." The State's obligation is not to convict, but to see that, so far as possible, truth emerges. This is also the ultimate statement of its responsibiility to provide a fair trial under the Due Process Clause of the Fourteenth Amendment. No respectable interest of the State is served by its concealment of information which is material, generously conceived, to the case, including all possible defenses. *Giles* v. *Maryland,* 386 U.S. 66, 87 S.Ct. 793, 17 L.Ed. 737 (1967).

The claim by the Attorney General that: the trial judge reasoned that if the jury found petitioner guilty of assault they would thereby necessarily be concluding that he had acted with the shared intent and purpose of the actual perpetrator and that he had assisted the actual perperator in the killing of Nicholas Chambers is indeed, a gross assumption that is unsupported by the record, and is untrue. The sum of the judge's views on this subject, can be clearly view on the record (See Exhibit A

attached to petitioner's Motion For A Writ Of Habeas Corpus, P. C21-C22).

Therefore, due to the respondent's inaccurate opposition, the petitioner prays that his application be granted in all respects.

(Sworn to by Larry Johnson, April 10, 1973.)

AFFIDIVIT OF SERVICE

I, LARRY JOHNSON, 17156, being duly sworn deposes and says: That he has placed in the hands of the Notary Public six (6) copies of a writ of Traverse to be notarized and forwarded to the following parties:

I. One original and two carbon copies to the United States District Court, Southern District of New York, U.S. Court House, Foley Square New York, N.Y. 10007.

II. One copy to the Attorney General, Louis J. Lefkowitz, 80 Centre Street, New York, N.Y. 10013.

(Sworn to by Larry Johnson, April 10, 1973.)

Opinion of Justice Fein, Denying Motion to Vacate Judgment.

ARNOLD L. FEIN, J.:

This is a motion pursuant to CPL sect. 440.10 to vacate the judgment of conviction. The defendant was convicted of murder after a jury trial. The judgment was affirmed on appeal (38 AD 2d 689), and leave to appeal to the Court of Appeals was denied.

He now claims error in that (1) the trial judge refused to charge assault as a lesser included count, although requested to do so by trial counsel, and (2) appellate counsel failed to raise the issue on the appeal. He appends an affidavit from one Steven L. Baumohl, a 1972 graduate of Columbia Law School, who states (1) he worked on the law school's Greenhaven Prison Project in June, 1972; (2) he contacted appellate counsel assigned for defendant's appeal; (3) appellate counsel told him he did not raise the issue on appeal as he felt there was no such request in the record. This is pure hearsay. Moreover, the request for the lesser charge was a matter of record which could have been raised on the appeal, if merited. The alleged failure to do so does not permit the defendant to institute a post-conviction attack on the judgment. (CPL sect. 440.10, subd. 2(c). Such alleged trial error is not of constitutional dimensions. It does not come within the scope of post-conviction relief. The trial court explained the reasons for refusing to charge the request. No error is shown in this respect. If appellate counsel's alleged oversight is intended as a claim of inadequate representation, such conduct occurred at the appellate level and not during the course of the proceedings in the nisi prius court. It does not appear that the trial court erred.

Defendant's next allegation is that the trial district attorney suppressed material evidence and this should entitle him to a vacatur of the judgment. He annexes an affidavit

from one Perry Ford, a co-defendant whose case was severed and who entered a separate plea to cover this case. Ford avers that he had told the trial assistant district attorney, Mr. Goldsmith, that the movant had nothing to do with the homicide, and the defendant claims that the district attorney should have brought this to defense counsel's attention. Mr. Goldsmith has submitted an opposing affidavit denying that he had ever spoken to Ford, face to face, and Ford's lawyer has submitted an affidavit stating that he has no knowledge of any discussion between Ford and Mr. Goldsmith.

The issue raised by Ford's affidavit was the subject of a motion to set aside the verdict and was decided adversely to the defendant by the trial justice (Tierney, J.), in an order entered on November 10, 1971. The order was affirmed on appeal (38 A D 2d 692). This determination is a bar to the instant claim (CPL sect. 440.10, subd. 2(a)). "Due process does not require a court to accept every sworn allegation as true. Many sworn allegations are palpably untrue, not improbable or unbelievable, but untrue." (People v. White, 309 N.Y. 636, 641).

The motion is denied in all respects.

Dated: September 5, 1972.

A. L. F.
J.S.C.

Petitioner's Exhibit No. 1.

APPELLATE DIVISION OF THE STATE OF NEW YORK

First Judicial Department

The People of the State of New York,

Respondent,

—against—

Larry Johnson, also known as Larry White, and Boyce Thompson,

Defendants-Appellants.

Appellant's Brief

Index

Petitioner's Exhibit No. 1.

FACTS

On December 14, 1968, William Van Hook, Cecil Luckie, Perry Ford, and defendants Boyce Thompson and Larry Johnson discovered the alleged murder victim, Nicholas Chambers, on Boston Road in the Bronx. Perry Ford, the alleged murderer of Nicholas Chambers, took a plea in a separate case unconnected with the prosecution of Boyce Thompson and Larry Johnson. Ford accused Chambers of having broken into the apartment of his girlfriend, Linda West (Mullins) and having stolen his coat. Chambers denied this. Ford and the others in the group went to Linda West's (Mullins') apartment with Chambers to discuss and resolve that question. When they reached her apartment on the 4th floor of the 5-story building at 576 East 165th Street, Bronx, New York, Linda West (Mullins) identified Chambers as the person she had seen on Boston Road with Perry Ford's coat on. Perry Ford then fought with Chambers and knocked him either dizzy or unconscious. Blood fell from Chambers' head onto the apartment floor. All of the people present were then instructed to strike Chambers so that they would also be involved. The testimony is contradictory as to whether Perry Ford or Larry Johnson insisted upon this action by the others present. Boyce Thompson then went through Nicholas Chambers' pockets and removed a screwdriver pliers, a glove, and a small amount of money. Boyce Thompson and Perry Ford got water and threw it on Chambers, who was lying on the floor either semi-conscious or unconscious. Although all of the eyewitnesses agree that Chambers was picked up by Perry Ford and Boyce Thompson and taken out of the apartment with their aid, they disagree as to whether Larry Johnson helped to take Chambers out of the apartment.

Linda West (Mullins) (166) and Boyce Thompson (456) say that Larry Johnson did not help Chambers; Cecil Luchie (139) and William Van Hook (323) say that he did. All agree, however, that Larry Johnson left the apartment simultaneously with Nicholas Chambers, Boyce Thompson and Perry Ford. William Van Hook last saw this group on the 6th step up from the fourth floor (325); Linda West (Mullins) last saw them on the 2nd step up from the fourth floor (262); Cecil Luckie last saw them a couple of steps up from the fourth floor (173, 201). Defendant Boyce Thompson who admittedly went all the way to the roof with Perry Ford and Nicholas Chambers, testified that Larry Johnson went as far as the fourth floor landing and then turned around (459). No witness or other evidence placed Larry Johnson any closer to the roof than the landing between the fourth and fifth floors of Linda West (Mullins') apartment house, which was a five floor walk-up with an additional flight-landing-flight to the roof (223). When Nicholas Chambers left the apartment he was able to walk (456) and he fought with Perry Ford on the roof (459-459a) before either falling or being knocked off the roof to his death (459; 460). Cecil Luckie heard Nicholas Chambers "mumbling" while he was in the hall (200). The District Attorney admits Nicholas Chambers was alive on his way to the roof (55). The prosecution physician offered "a fall from a great height" as the cause of Nicholas Chambers' death (64). There was no proof at the trial that Nicholas Chambers was not alive on the roof of the apartment house; indeed, all concerned agree that the 6-story fall caused Nicholas Chambers' death.

The Grand Jury indicted the defendants for murder in (First Count) throwing Nicholas Chambers from a building and (Second Count) acting with depraved indifference to human life and recklessly engaging in con-

duct which created a grave risk of death by throwing Nicholas Chambers from the building. Count No. 1 was amended by the Court upon oral motion by the District Attorney after completion of the voir dire, the administration of the jurors' oath, and the Court's delivery of a preliminary statement and instructions to the jury. Count No. 1 was changed from accusing the defendants of causing the death of Nicholas Chambers to acting in concert with each other to cause the death of Nicholas Chambers. Over the vociferous and persistent protests of both defense counsel (43-48A) the Court permitted this amendment, characterizing its action in ordering this amendment of the indictment as "merely clarifying what is in essence an irregularity rather than a material change in the language of the indictment . . ." (46).

The jury found both defendants guilty of murder and both defendants were sentenced to 15 years to life imprisonment on January 23, 1970. Appellant appeals from that conviction and sentence.

POINT I. PERMITTING AMENDMENT OF THE INDICTMENT AFTER VOIR DIRE, JURY SELECTION, ADMINISTRATION OF THE JURORS' OATH, AND THE COURT'S PRELIMINARY INSTRUCTIONS WAS ERROR OF SUFFICIENTLY PREJUDICIAL NATURE TO WARRANT REVERSAL.

The District Attorney was in possession of all the facts surrounding the death of Nicholas Chambers at all times before, during, and after the presentation of this matter to the Grand Jury. If the District Attorney wished to amend the indictment, and if such amendment were permissible (which defendant-appellant denies), then such application for amendment should have been

promptly and timely made. The indictment was handed down by the Grand Jury on January 14, 1969. The trial of the instant matter was commenced on November 24, 1969, with the actual work of selecting the jury beginning one week later on December 1, 1969. For more than 10 months the District Attorney failed to make application for this amendment of the indictment. The most signicant and prejudicial delay, however, was during the one week from the commencement of the voir dire to the commencement of the trial, the time when appellant and his counsel were so intensively preparing for trial. Even if the District Attorney had delayed until the voir dire his request for this amendment, if he had made the request at that time the defendant-appellant and his counsel could have had some time to prepare to meet the new charge. But the District Attorney chose to wait until moments before his opening to the jury to make this request. Appellant was ill-advised as to the nature of the crime charged. By granting this request and amending the indictment at this time the Court committed substantial prejudicial error warranting reversal of this conviction.

POINT II. THE COURT WAS NOT EMPOWERED TO AMEND THE GRAND JURY'S INDICTMENT AND ITS ERRONEOUS ACTION IN DOING SO WARRANTS REVERSAL OF THE CONVICTION.

At common law there was no power in a court to amend or modify an indictment. *Peo.* v. *Fiske,* 194 Misc. 62, 85 N.Y.S.2d 240 (1949). Except for changes of nonessential details, pursuant to statutory authority, or the addition of related counts, a court cannot usurp the authority of a grand jury by a unilateral amendment of an indictment. CCP § 293. *Peo.* v. *Kramer,* 10 Misc.2d 473, 175 N.Y.S.2d 508 (1958). Amendment to an indictment which sought

to substitute a crime not charged by the grand jury was invalid and bestowed no jurisdiction on the court to try crime charged in court as amended. CCP § 293. *Peo.* v. *Brumfield,* 31 A.D.2d 726, 297 N.Y.S.2d 31 (1969). The indictment could not be amended without the intervention of the Grand Jury. *Peo.* v. *Crawford,* 27 A.D.2d 312, 278 N.Y.S.2d 942 (1967); See also *Peo. ex rel. Grace* v. *McCollon,* 199 Misc. 610, 100 N.Y.S.2d 124 (1950).

In permitting amendment of the Grand Jury's indictment to allow the phrase "in concert with each other" to the first degree murder charge was prejudicial error warranting reversal of the conviction.

POINT III. THE EVIDENCE PRESENTED AT THE TRIAL DID NOT SUPPORT DEFENDANT-APPELLANT'S CONVICTION OF FIRST DEGREE MURDER, EITHER INDIVIDUALLY OR IN CONCERT WITH OTHERS. A POST-TRIAL LETTER FROM THE MURDERER PERRY FORD, CORROBORATES THE TRIAL TESTIMONY THAT DEFENDANT-APPELLANT WAS NEVER ON THE ROOF ON THE NIGHT OF THE CRIME.

The facts as alleged by the prosecution and both co-defendants point to the conclusion that if Nicholas Chambers was murdered he was murdered by Perry Ford. On or about February 4, 1970, Perry Ford sent a letter to Mrs. Joanne Johnson to be given to Mary Lowe, Larry Johnson's attorney at the trial below. Without knowledge of the substance of the testimony at the trial, Perry Ford's letter is consistent with the trial testimony in every respect. Appellant Larry Johnson moved, in November 1970, through the author of this brief, for a new trial based upon this newly discovered evidence, but Mr. Justice Tierney has not rendered a decision on this motion to

date. Perry Ford's letter, in its entirety, is transcribed below

Dear Mrs. Lowe,

I would like to bring something to your attention and also to the court attention, which I feel is very much needed and important. This matter concerns both your client and one other person. Who was said to have been involved in a murder case with me. Which your client had nothing to do with, meaning Larry Johnson. The other person took part in it because he was made to do so, if he wouldn't have done what he was tolded he would have also die. Not saying that this murder was done deliberately, because it wasn't, but just the same the person is dead. But let me put the facts on the line.

To begine: I was incarcerated for a crime and was being held at Racket Island awaiting court's decision on this crime. At this time I was living with Linda West who was staying at 576 East 165 Street. She is the mother of my child.

While I was locked up, ("Nick who is the decease in this case.") accompany with two other robbed the home of Linda West taking her thing & mine and something belonging to a very close friend of mine who had just die. Linda wrote me and tolded me about what had happened in return I wrote her back telling her not to worry about it and that I would take care of it when I get out. On December 12, 1968 I was discharge from court and went directly to my mother's home. There I ate and went to sleep for a few hour, that evening I went down to Linda house to see her and the baby. About four or five days went by, and on the night of the 17th myself acompany with four others ran in to Nick at the time we were

headed down town towards 165 St. I went over to Nick and told him that I wanted to speak with him about somethings that was taken from my women house. At the time he didn't want to come because he was robbing somebody house for a record player. But after speaking to him for a few moments he decided to come with me to get to the bottom of the hold thing. "We" (meaning the six of us went over to Linda's house. Once there I asked Nick about the things that were taken, he (Nick) denied knowing anything about it, so I called Linda out of the bedroom and asked her in front of Nick did she see him with any of the things that were taken she said "yes" I asked her what she (Linda) said a black coat of mine. I sent her back in to the bed room. I asked Nick about the things again, and once more he tolded me that he did not know anything about them so we had a short fight after the fight he said that he did no something about the things that were taken, but that he wasn't going to say what. So once again we started fighting and then we began to leave but before we went I called Linda out of the bedroom and tolded her to clean up the blood on the floor. Nick was sort of shook up but still was able to walk, I didn't want to leave him by the apartment or on that landing, so once out side in the hallway Larry & Scatter helped me put Nick in between the next landing, while Cecil & Korren started down stairs, right after they started down Larry followed down leaving Scatter and myself upstairs with Nick, Scatter started also to go down but I asked him where was he going he (Scatter) said down stairs I asked him to help me take Nick up to the roof he (Scatter said he didn't want to I pulled my gun and tolded him to do as I said and he did in fear of losing his own life once on the roof I asked Nick about my things again and he

Petitioner's Exhibit No. 1.

said I am not going to tell you anything, and broke away from me so we started fighting again Nick try to run in to me and grab me but I hit him and moved faster then he did he went off the edge of the roof.

Scotter was already gone when I look around. I don't know if he seen what happened or not. And I didn't aske him when I came down. I didn't kill Nick deliberately and really didn't care one way or another about his death.

I would only like the chance to keep two people from being locked up for something they didn't do. I would also like to tell this in open court before it is too late. I was never given a chance to tell about what went down until now. The only time Linda came in to the room was to answer a question and to clean up the blood from the floor. I am not being pressured in anyway to say this thing. I feel that the court should know what reallied happened.

Perry Ford 200-69-32

Thank you.

[The original of this letter is in the possession of the author of this brief.]

If there was any doubt about the assertion of co-defendant Boyce Thompson that Larry Johnson was never higher than the fourth-floor landing, never closer than one-and-one-half floors from the roof from which Nicholas Chambers fell to his death, this doubt must finally be erased by Perry Ford's independent confirmation of this vital fact. Of course, the entire basis of the prosecution's accusation that defendants "acted in concert with each other" to kill Nicholas Chambers is that they both, together with Perry Ford, took Nicholas Chambers to that roof and caused him to fall the six floors to his death. The prosecu-

tor drove this point home quite forcibly in his summation (560-1). It is only through the vehicle of showing the defendants heading for the roof with Perry Ford and Nicholas Chambers that the prosecution asked the jury to infer intent to commit murder on the part of the defendants. It is only because Nicholas Chambers was found dead directly beneath some broken roof coping that the prosecution claims it proved that all four, Perry Ford, Nicholas Chambers, Boyce Thompson and Larry Johnson, were on the roof (561-2). But although they proved on the People's case that Nicholas Chambers was on the roof, they did not actually establish the presence of any of the other three on the roof. And even after the entire evidence was completed, after Boyce Thompson testified that he and Perry Ford were also on the roof with Nicholas Chambers, there was not even one shred of proof to place Larry Johnson on the roof in the evening of the crime. Perry Ford's letter and Boyce Thompson's testimony, together with the total lack of proof by the prosecution on this point, demonstrate that there was neither intent nor opportunity to commit murder on the part of appellant Larry Johnson. This is not a matter of renunciation of intent; this is a matter of the *total failure of proof* of intent on the part of Larry Johnson to cause, either directly or in concert with others, the death of Nicholas Chambers.

Conclusion

The conviction should be reversed and the indictment against appellant Larry Johnson dismissed.

Respectfully submitted,

Lawrence P. Zamzok
Attorney for Appellant
Larry Johnson

Petitioner's Exhibit No. 1.

APPELI ATE DIVISION OF THE STATE OF NEW YORK—FIRST JUDICIAL DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—against—

LARRY JOHNSON, also known as LARRY WHITE, and and BOYCE THOMPSON,

Defendants-Appellants.

STATEMENT PURSUANT TO RULE 5531 C. P. L. R.

1. The indictment number in the Court below was 187/69.
2. The full names of the original parties were The People of the State of New York against Perry Ford, Larry Johnson, also known as Larry White, and Boyce Thompson. On November 24, 1969, on the motion of Assistant District Attorney Irwin Goldsmith, granted by Justice Charles G. Tierney, Perry Ford was severed from this indictment and only Larry Johnson, as Larry White, and Boyce Thompson went to trial. Larry Johnson, also known as Larry White, and Boyce Thompson are the only parties to this appeal.
3. This action was commenced in the Supreme Court, Bronx County.
4. This action was commenced by the filing of an indictment on January 14, 1969.
5. This appeal is from judgments convicting the appellants after a jury verdict found each guilty of Murder.
6. This appeal is from judgments of conviction rendered on January 23, 1970.
7. The appendix method is not being used on this appeal.

Petitioner's Exhibit No. 2.

SUPREME COURT : STATE OF NEW YORK

APPELLATE DIVISION—FIRST DEPARTMENT

Indictment No. 187/69

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

—against—

LARRY JOHNSON a/k/a LARRY WHITE,
Defendant-Appellant,

and BOYCE THOMPSON,
Defendant.

APPELLANT'S BRIEF

INDEX

Petitioner's Exhibit No. 2.

FACTS

A jury found both defendants guilty of murder and both defendants were sentenced to 15 years to life imprisonment on January 23, 1970. Defendants have appealed from that conviction and sentence, said appeal is to be heard by this Court on November 24th, 1971. By order of the Hon. Harold A. Stevens, Presiding Justice of this Court, on November 17th, 1971, the instant appeal is to be heard on November 24th, 1971, together with the appeal from the conviction and sentence.

Appellant respectfully refers the Court to the statement of facts in his brief submitted on the appeal from the conviction and sentence.

In November, 1970, appellant moved before Mr. Justice Charles Tierney, Supreme Court, Bronx County, for a new trial based upon the failure of the People of the State of New York to establish that said defendant was at the scene of the crime and upon newly discovered evidence, together with such other and further relief as to this Court may seem just and proper. The motion was opposed by the People by the affirmation of Irvin J. Goldsmith, Esq. dated December 4, 1970. In support of the motion appellant submitted the letter of Perry Ford, dated February 4, 1970, and the affidavit of Perry Ford sworn to the 3rd day of August, 1971. On November 9, 1971, one year after the submission of the motion, Mr. Justice Tierney denied appellant's application for an order vacating the verdict and judgment of guilty in dismissing the indictment and/or granting the defendant LARRY JOHNSON a new trial. Appellant appeals from that order.

Petitioner's Exhibit No. 2.

POINT I

NEWLY DISCOVERED EVIDENCE WHICH WOULD PROVE DEFENDANT'S INNOCENCE CANNOT BE CONSIDERED ON AN APPEAL, BUT MAY BE USED ON A MOTION FOR A NEW TRIAL IN THE TRIAL COURT.

The jury found both defendants guilty of murder and both defendants were sentenced to 15 years to life imprisonment on January 23, 1970. After that date, on February 4, 1970, the perpetrator of the crime, Perry Ford, sent a letter to be forwarded to Mrs. Mary Lowe, appellant's counsel below, admitting his involvement in this matter and exhonorating appellant completely from any involvement in the murder of Nicholas Chambers. This had been testified to at the trial by appellant BOYCE THOMPSON, who testified that LARRY JOHNSON never went to the roof of 576 East 165 Street, Bronx, New York, where the murder was allegedly committed. These facts were put into the form of an affidavit, which was sworn to by Perry Ford on the 3rd day of August, 1971 and submitted to the Court immediately thereafter.

Newly discovered evidence which would prove defendant's innocence cannot be considered on an appeal, but may be used on a motion for a new trial in the Trial Court. People v. Kolakowski, 260 App. Div. 995, 25 N.Y.S. 2d 4. The testimony of BOYCE THOMPSON, the letter of Perry Ford dated February 4, 1970, and the affidavit of Perry Ford sworn to the 3rd day of August, 1971, together with the total failure of proof on the part of the People to establish appellant's presence on the roof at any time on the night of the alleged murder, clearly demonstrates appellant's innocence herein. This newly discovered corroborative evidence of Perry Ford would certainly have exhonorated appellant at the trial below. It is properly

submitted on a motion for a new trial in the Trial Court, and it is such tremendous impact that it would have certainly affected the decision below. This newly discovered evidence should have satisfied the Court as to the wisdom of granting appellant a new trial based thereon, and the motion therefor should have been granted.

POINT II

THE TRIAL COURT HAS AUTHORITY TO GRANT A NEW TRIAL WHEN SUBSTANTIAL JUSTICE HAS NOT BEEN DONE.

Although a judge who presides over a jury trial should not set aside a verdict of a jury merely because he would have decided differently on the facts presented, the judge should not permit the verdict to stand where he concludes that the verdict is manifestly a miscarriage of justice, and conscientiously believes that it was based upon insufficient or untruthful testimony. People v. Ramos, 33 App. Div. 2d 344, 308 N.Y.S.2d 195. Where, on the return of a verdict of guilty, the trial court conscientiously concludes that the weight of the evidence does not support a finding of guilty beyond a reasonable doubt, the Court should set aside the verdict of guilty and grant a new trial. Id. That is exactly the situation in the case at bar: there was no testimony that appellant was on the roof of the building at the time of the alleged murder, that he made any affirmative move whatsoever to effect the alleged murder of Nicholas Chambers, or that he had any knowledge whatsoever that Nicholas Chambers was to be (or desire to have him) murdered on the night in question.

The trial court has authority to grant a new trial when the motion therefor is addressed to the conscience and sound judicial discretion of the trial court. Whether such motion should be granted or refused involves inquiry into

whether substantial justice has been done. People v. Whitmore, 45 Misc. 2d 506, 257 N.Y.S.2d 787, reversed on other grounds 27 App.Div.2d 939, 278 N.Y.S.2d 706. Appellant respectfully submits that the interests of justice are not served by allowing this wrongful judgment of conviction to stand. The Court below has indicated that the participation or non-participation of appellant in the events which led directly to the death of Nicholas Chambers was at the very heart of the testimony which was adduced upon the trial. In actuality, there was no testimony as to the participation in the crime of murder, but only in an assault which certainly did not lead to the death of Nicholas Chambers.

In the case at bar appellant should be permitted a new trial wherein he can present the testimony of not only Boyce Thompson but also Perry Ford to show his complete innocence of the crime of murder. An innocent man has been condemned to spend perhaps the rest of his life in the prisons of this State for the commission of a crime of which he is totally innocent. A reading of the record which shows that the case against him should have been dismissed at the end of the People's case, for no one placed him at the scene of the alleged crime. Even after all of the testimony was in and the case was closed, no witness placed appellant at the scene of the crime. The failure of the prosecutions' case, together with the exhonorating testimony of Perry Ford, which appellant submits will be in conformity with his letter and affidavit submitted in support of the motion for a new trial, clearly show that appellant would prevail upon a new trial. Appellant respectfully prays for an opportunity to prove himself innocent of this crime.

Petitioner's Exhibit No. 2.

CONCLUSION

THE MOTION FOR AN ORDER VACATING THE VERDICT AND JUDGMENT OF GUILT AND DISMISSING THE INDICTMENT AND/OR GRANTING DEFENDANT LARRY JOHNSON A NEW TRIAL BASED UPON FAILURE OF THE PEOPLE TO ESTABLISH THAT SAID DEFENDANT WAS AT THE SCENE OF THE CRIME AND UPON NEWLY DISCOVERED EVIDENCE, SHOULD HAVE BEEN GRANTED.

Respectfully submitted,

LAWRENCE P. ZAMZOK
Attorney for appellant
LARRY JOHNSON

Petitioner's Exhibit No. 2.

SUPREME COURT : STATE OF NEW YORK

APPELLATE DIVISION : FIRST DEPARTMENT

Indictment # 187/69

(Page 7)

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—against—

LARRY JOHNSON, a/k/a LARRY WHITE,

Defendant-Appellant

and BOYCE THOMPSON,

Defendant.

STATEMENT PURSUANT TO RULE 5531 C.P.L.R.

1. The indictment number and the Court below was 187/69.

2. The full names of the original parties were the People of the State of New York vs. Perry Ford, Larry Johnson a/k/a Larry White and Boyce Thompson. On November 24, 1969 on the motion of Assistant District Attorney Irvin Goldsmith, Mr. Justice Charles G. Tierney severed the case against Perry Ford from this indictment and only Larry Johnson a/k/a Larry White, and Boyce Thompson went to trial. Both were convicted of murder and sentenced to 15 years to life. In November, 1970, Larry Johnson made a motion for an

order vacating the verdict and judgment of guilty and dismissing the indictment and/or granting the defendant Larry Johnson a new trial based upon the failure of the People to establish that said defendant was at the scene of the crime and upon newly discovered evidence, together with such other and further relief as to this Court may seem just and proper.

3. This action was commenced in the Supreme Court, Bronx County.

4. This action was commenced by the filing of an indictment on January 24, 1969.

5. This appeal is from the order of Mr. Justice Charles G. Tierney denying appellant's motion for an order vacating the verdict and judgment of guilty and dismissing the indictment and/or granting the defendant, Larry Johnson a new trial, dated November 9, 1971.

6. The appendix method is not being used on this appeal.

Opinion and Order, January 30, 1974.

APPEARANCES

John J. Tigue, Jr., New York City, for petitioner

Louis J. Lefkowitz, Attorney General, State of New York (Constance B. Margolin, Deputy Assistant Attorney General, of counsel) for respondent

BAUMAN, D. J.

Larry Johnson, currently confined in the Green Haven Correctional Facility, petitions this court for a writ of habeas corpus. On January 23, 1970, he was sentenced by Justice Charles G. Tierney of the Supreme Court, Bronx County, to a term of fifteen years to life after a jury trial in which he was convicted, along with one Boyce Thompson, of murder. His motion for a new trial based on newly discovered evidence was denied by Justice Tierney on November 9, 1971. Both the judgment of conviction and the order denying a new trial were unanimously affirmed, without opinion, by the Appellate Division. *People* v. *Johnson,* 38 A.D.2d 689 and 38 A.D.2d 692 (1st Dept. 1971); leave to appeal to the Court of Appeals was denied on January 25, 1972. A second new trial motion, based on substantially the same grounds asserted in the instant petition, was denied by Justice Fein of the Supreme Court, Bronx County, on September 5, 1972 and leave to appeal to the Appellate Division was denied by Justice Steuer on October 31 of that year.

After reading the instant petition, I concluded that an evidentiary hearing was warranted. Counsel was assigned, and a two day hearing was held after which further briefs were submitted. What follows constitutes my findings of fact and conclusions of law.

Opinion and Order, January 30, 1974.

I.

A brief statement of the facts adduced at the trial before Justice Tierney is necessary to place petitioner's present contentions in context. On December 14, 1968, Johnson, Boyce Thompson, Perry Ford, Cecil Luckie and William Van Hock, also known as Koreem Evans,[1] met one Nicholas Chambers at Boston Road and 168th Street in the Bronx. The six men then proceeded to the apartment of Linda West Mullins, Ford's common law wife, located at 165th Street and Boston Road. Ford had recently been released from prison and during his incarceration his apartment had been burglarized. Mrs. Mullins apparently suspected Chambers, and had recently told Ford that she had seen someone wearing a coat which she believed belonged to him. It was thus Ford's intention to see whether Mrs. Mullins would identify Chambers as the possessor of the coat.

When they reached the apartment she did so identify Chambers and Ford immediately accused him of the burglary. Chambers denied it, and was thereupon savagely beaten. The principal damage was apparently inflicted by Ford, although each of the other four participated to some degree.[2] After Chambers had been knocked more or less senseless, Van Hook and Luckie were told to go downstairs. As they were descending the stairs from fourth floor apartment, the two men saw Johnson, Thompson, and Ford carrying Chambers up the next flight of stairs, apparently toward the roof.

There was a significant hiatus in the state's case at this juncture; it presented no eye witness testimony of what transpired on the roof. Mrs. Mullins testified that Ford returned to the apartment fifteen to twenty minutes later and informed her that he had just thrown Chambers

off the roof. Luckie and Van Hook testified that they waited outside the apartment building until Thompson came down and showed them Chambers' body lying in an alley beside the building. Thompson, testifying on his own behalf, stated that as the four men reached the landing between the fourth and fifth floors, Johnson turned and went downstairs. When Thompson started to do likewise, his account continues, Ford pulled a gun and ordered him to continue upwards. On the roof, according to Thompson, Ford and Chambers started fighting, and at some point Ford "punched the guy and he fell off the roof."

Both Johnson and Thompson were found guilty of murder, and both were given sentences of fifteen years to life. Ford, who had previously pleaded guilty, was sentenced to a term of twenty years.

II.

Johnson has presented two arguments in support of his petition. First, he contends that the prosecution violated his rights secured by *Brady* v. *Maryland,* 373 U.S. 83 (1963), by failing to disclose exculpatory information to his trial counsel. More specifically, he alleges that Irvin J. Goldsmith, the Assistant District Attorney in charge of the prosecution, was told by Perry Ford in an interview in October, 1969, several weeks before the trial, that the petitioner had not been on the roof when Chambers fell off. This information, it is contended, was never communicated to Mary Johnson Lowe, petitioner's trial counsel, who consequently did not summon Ford to testify at trial. Second, petitioner contends that the trial court erroneously failed to submit to the jury the lesser offenses included within the crime of murder. Petitioner argues that this failure was in itself a violation of due process; in addition, however,

he argues that the failure of his assigned counsel to raise this point on appeal violated his right to counsel secured by the Sixth Amendment.

III.

Resolution of the first of these contentions requires a threshold determination of credibility. At the hearing held before me, Perry Ford testified that in October, 1969, he was brought to the Bronx County Courthouse and thereafter delivered to Irvin Goldsmith's office. During this interview, which took place outside the presence of his assigned counsel, Ford told Goldsmith his version of the events of December 14, 1968, namely, that Johnson did not accompany him to the roof of the building, and was in no way implicated in the fall of Chambers from the roof. Ford also testified that Goldsmith was dissatisfied with this account, stated that he was not "helping himself" with such a story, and that there would be no recommendation of a lenient sentence if Ford adhered to it. Ford also testified that he endeavored to communicate this version to Mrs. Lowe, petitioner's trial counsel, and there was introduced in evidence a letter from Ford to petitioner's wife, to be forwarded to Mrs. Lowe, containing Ford's version of the crime substantially as he had testified. The letter, however, was dated February 4, 1970 and was thus too late to be of use at the trial.

When called to testify at the hearing in the case at bar, Mr. Goldsmith denied that any such meeting had taken place. I accept this testimony, not merely because I found Goldsmith, who is First Assistant District Attorney and Chief of the Homicide Bureau of Bronx County, a credible witness, but also because the available evidence regarding the practices of the District Attorney's office supports his account. First, Goldsmith testified that he never interviewed a defendant in a criminal case outside the presence

of that defendant's lawyer as well as a police officer. Ford, however, testified that he met Goldsmith alone. Second, Goldsmith's dairy bore no entry of such a meeting. Third, Goldsmith testified that a defendant cannot be brought to the District Attorney's offices without some form of court order. No such order is contained in the Ford case folder. Goldsmith's testimony is further buttressed by the affidavit of Noah Braunstein, Ford's assigned counsel, stating that he is unaware that Ford ever discussed his case with Goldsmith outside his presence and has no information of such an event ever having transpired.

On balance, then, Goldsmith's testimony is the more plausible. To accept Ford's account would be to believe that there were three significant departures from the unvarying practices of the District Attorney's office: the interview of a defendant by a prosecutor without his lawyer, the interview of a defendant by a prosecutor without a police officer, and the delivery of a defendant to a prosecutor without a court order. I am unwilling to assume that an experienced and obviously competent prosecutor would sanction such departures. I find the testimony of Goldsmith was honestly given and, as I have stated, fully credible. I further find that no meeting ever took place between Ford and Goldsmith, and consequently that the prosecution withheld no exculpatory evidence in violation of its obligations under *Brady*.[3]

IV.

Petitioner's second contention raises a vastly more difficult problem. In order to discharge my obligations with respect to the petition I am required at the outset to ascertain the applicable state law. With all respect for the learned members of the state court bench, it seems clear

that under their decisions the trial court erred in failing to charge the lesser included offenses.

People v. *Mussenden,* 308 N.Y. 558 (1955), contains the standard formulation of the doctrine of lesser included offenses. Judge Fuld, speaking for the Court of Appeals, stated the doctrine in the following manner:

> "It has been repeatedly written that if, upon any view of the facts, a defendant could properly be found guilty of a lesser degree or an included crime, the trial judge must submit such lower offense . . . . And it does not matter how strongly the evidence points to guilt of the crime charged in the indictment, or how unreasonable it would be, as a court may appraise the weight of the evidence, to acquit of that crime and convict of the less serious." 308 N.Y. at 562.

The court added one qualification to this principle:

> "The submission of a lesser degree or an included crime is justified only where there is some basis in the evidence for finding the accused innocent of the higher crime and yet guilty of the lower one . . . . The trial court may not, however, permit the jury to choose between the crime charged and some lesser offense where the evidence essential to support a verdict of guilt of the latter necessarily proves guilt of the greater crime as well." 308 N.Y. at 563.

The holding of *Mussenden* has been codified in C.P.L. § 300.50[4] and widely followed subsequently. See, e.g., *People* v. *Asan,* 22 N.Y.2d 526 (1968); *People* v. *Usher,* 39 A.D.2d 459 (4th Dept. 1972); *People* v. *Calhoun,* 20 A.D.2d 528 (1st Dept. 1963). Indeed, the New York Court of Appeals has gone so far as to hold that "the conditions are exceptional" where a "refusal to instruct the jury as to

their power to convict of a lower degree" is warranted. *People* v. *Malave,* 21 N.Y.2d 26 (1967); *People* v. *Schleiman,* 197 N.Y. 383 (1910); *People* v. *Richardson,* 36 A.D. 2d 25 (4th Dept. 1971).

Applying the doctrine to the facts before me, I am convinced both that petitioner's trial counsel made the necessary request for the submission of an assault charge to the jury, as § 300.50 requires, and that the trial court's denial was without legal justification. A fair reading of the colloquy between court and counsel, set out in the margin,[5] suggests that Mrs. Lowe did request a charge of assault, and that the court declined this request because it felt that the crime of assault "merged" into that of murder. Read most charitably, the court's remarks suggest that it concluded that the case fell within the *Mussenden* exception, and that the jury could not have found the petitioner guilty of assault without finding him guilty of murder as well. With all deference, I must conclude that the court was in error. The jury could have believed the testimony of Van Hook and Luckie that petitioner participated in an assault and simultaneously accepted Thompson's account of Chambers' death, which exonerated the petitioner. The *Mussenden* exception is thus inapplicable, for it applies only where a finding of guilt on the lesser included offense necessarily implies a finding of guilt on the greater.

Justice Tierney thus disregarded the settled rule, enunciated in *Mussenden* and elsewhere, that a refusal to charge a lesser included offense is justifiable only where *there is no possible view of the facts* which permits the jury to find such an offense. The facts developed at the trial most assuredly support a jury finding of the crime of assault, and petitioner was thus entitled to such an instruction.

It is generally recognized, however, that habeas corpus does not lie to set aside a conviction based on improper jury instructions, save upon a clear showing that the errors

complained of were so egregious as to constitute a denial of due process. *Young* v. *State of Alabama*, 443 F.2d 854 (5th Cir. 1971); *United States ex rel. Mintzer* v. *Dros*, 403 F.2d 42 (2nd Cir. 1968); *Galloway* v. *Burke*, 297 F.Supp. 624 (E.D.Wis. 1969); *Auger* v. *Swenson*, 302 F.Supp. 1131 (W.D.Mo. 1969). The failure to charge lesser included offenses has not, on the whole, been deemed sufficiently flagrant. *Poulson* v. *Turner*, 359 F.2d 588 (10th Cir.), cert. denied, 385 U.S. 905 (1966); *Wade* v. *Yeager*, 245 F.Supp. 67 (D.N.J. 1965).

Given the foregoing propositions, one serious question only remains: was the failure of petitioner's assigned counsel to raise on appeal the issue of the trial court's erroneous charge so outrageous as to deny petitioner the effective assistance of counsel? The answer depends upon a careful consideration of the available precedents and of the evidence developed at the hearing.

Petitioner was not represented on appeal by Mrs. Lowe, whose competence is beyond question. He was instead represented by a lawyer who was assigned by the Appellate Division, First Department. That attorney is a 1964 graduate of Columbia Law School and was admitted to the bar in that year. From then until June, 1970, the time of his appointment in the instant case, he was associated with law firms whose practice consisted almost entirely of personal injury litigation. In the course of that practice, he had handled only one appeal. The entirety of his prior exposure to the criminal law consisted of a one semester course at Columbia, and two or three criminal appeals which he had undertaken on appointment. He admitted at the hearing, however, that none of these appeals involved a trial transcript; they were rather undertaken on behalf of prisoners who had entered guilty pleas and who then sought to contest the voluntariness of the plea or the severity of sentence.

In prosecuting petitioner's appeal, the assigned appellate counsel never spoke to his client or to Mrs. Lowe, whom he claimed he was unable to locate. He filed two briefs with the Appellate Division, one from the judgment of conviction, and one from Justice Tierney's denial of his new trial motion, which had been based on Perry Ford's letter to Mrs. Lowe exonerating the petitioner. The brief appealing the denial of the motion was six pages in length; that appealing from the judgment of conviction was ten. Of these ten pages, three were devoted to a statement of facts, and another two to a verbatim transcription of Perry Ford's letter, which had not, of course, been admitted in evidence at the trial and was thus not properly before the appellate court. In the remaining five pages, two points were raised: (a) the evidence was insufficient to convict, and (b) the trial court erred in permitting amendment of the indictment immediately prior to trial. The court failure to charge lesser included offenses was never raised, quite simply because, as the lawyer testified at the hearing, he was unaware of the doctrine. Although he remembers reading the colloquy set forth in footnote 5, supra, he utterly failed to grasp its import. The issue was thus never raised by him on petitioner's direct appeal; although petitioner attempted to raise it in his new trial motion submitted to Justice Fein, the court ruled that not having been raised on appeal, the point could not be the subject of post-conviction relief.

The handling of the appeal was manifestly inadequate, but was it so inadequate as to deny petitioner the effective assistance of counsel? The prevailing standard in this Circuit was first enunciated in *United States* v. *Wight*, 176 F.2d 376 (2nd Cir. 1949), cert. denied, 338 U.S. 950 (1950). In order to infringe the Constitution, "[a] lack of effective assistance of counsel must be of such a kind as to shock the conscience of the court and make the proceedings a farce and mockery of justice."[6]

That standard provides little or no assistance in evaluating concrete cases. The use of the "shock the conscience test" in giving scope and content to the Due Process Clause was long a particular object of Justice Black's scorn,[7] but it appears to survive unimpaired in this remote pocket of constitutional law. If the general standard is of little use, it is then necessary to examine how that standard has been applied in recent years by our Court of Appeals. As I see it, the cases in which the court has considered ineffective assistance claims are divisible into three categories: (1) those cases in which the court has examined the performance of counsel and found no ineptitude; (2) those where the court has found ineptitude, but concluded that it did not rise to the "farce and mockery" level; and, (3) not surprisingly the smallest category, those cases in which the court has found the ineptitude sufficiently shocking as to constitute a deprivation of the right to counsel. I shall briefly examine each of these categories in turn.

In the first category are cases in which the petitioner quarrels with the trial tactics adopted by his lawyer; typically, they allege the failure to call or interview certain witnesses,[8] the adoption or rejection of a particular line of defense,[9] the failure to put the defendant on the witness stand,[10] or the failure to investigate certain leads.[11] Such cases have consistently held that the choice of trial tactics, even if erroneous in retrospect, does not constitute ineffective assistance of counsel. The other broad class of cases in this first category consists of those in which the decisions of counsel were fully justified by the evidence developed at trial or the underlying circumstances of the case. Among such cases are one in which counsel's advice to plead guilty was deemed justified by the court in light of the government's case against the defendant,[12] or another in which counsel's failure to re-

quest a suppression hearing or a hearing on electronic surveillance was deemed justified in view of the obvious inefficacy of such motions.[13] The ineptitude there lies not with the lawyer, but with a client unable to comprehend fully adequate representation.

The second class consists of cases in which the court has found the behavior of counsel inept but not "shocking." These are of law and of judgment. In *United States ex rel. Scott* v. *Mancusi,* 429 F.2d 104 (2nd Cir. 1970), cert. denied, 402 U.S. 909 (1971), petitioner entered a plea of guilty upon his counsel's advice that New York law permitted withdrawal of a guilty plea as of right. Although the court acknowledged that this advice was incorrect, it demonstrated no "horrible ineptitude." In *United States* v. *Matalon,* 445 F.2d 1215 (2nd Cir.), cert. denied, 404 U.S. 853 (1971), appellant based his claim of ineffectiveness on his counsel's decision to call seven character witnesses, each of whom was impeached with evidence of the appellant's prior criminal record. Had these witnesses not been called, such history could not have been introduced. While the decision to call one such witness could have been deemed an erroneous tactic, the court virtually conceded that calling seven in succession was patent stupidity. Nevertheless, this unenlightened performance was not deemed sufficiently "shocking." In *United States ex rel. Marcelin* v. *Mancusi,* 462 F.2d 36 (2nd Cir. 1972), cert. denied, 410 U.S. 917 (1973), the court held that counsel's failure to explore the possibility of presenting an insanity defense, which was manifestly the only possible effective defense available to the defendant, was not an error of constitutional magnitude. Judge Kaufman disserted, arguing that the charge of murder involved in that case required "the ultimate in resourceful and dedicated presentation" of a defense, and that such presentation had been sadly lacking.

I turn finally to the third category, consisting of those cases in which the argument of ineffective assistance has prevailed. Examples of outright malfeasance appear to come within this category. In *Mosher* v. *LaVallee* —— F. 2d —— (2nd Cir., January 8, 1974), affirming 351 F.Supp. 1101 (S.D.N.Y. 1973), petitioner was told by his counsel that the trial court had promised a sentence of 15 to 16 years if he pleaded guilty. This statement was simply false, and a term of 40 to 60 years was imposed. This was found to be a denial of the effective assistance of counsel.

Misfeasance has, however, upon occasion been of constitutional magnitude. In *United States ex rel. Maselli* v. *Reincke,* 383 F.2d 129 (2nd Cir. 1967), affirming 261 F. Supp. 457 (D.Conn. 1966), petitioner's attorney failed to file a notice of appeal, largely, it seems, because he believed that he could successfully negotiate with the state prosecutor for a concurrent sentence on another pending charge. Nor did the attorney inform the petitioner that if indigent, he was entitled to appointment of counsel who would file an appeal on his behalf. Meanwhile, petitioner's co-defendant had appealed, and his conviction was reversed by the Connecticut Supreme Court for insufficiency of evidence. The Second Circuit affirmed the district court's finding that the representation afforded petitioner here was sufficiently inept as to render the proceedings a "farce and mockery of justice." The court stated: "[h]ere, under circumstances suggesting that an appeal would probably, if not certainly, be successful, counsel's conduct effectively deprived Maselli of his right to appeal as well as his right to the assistance of counsel on appeal. This is not a case where hindsight reveals tactical or strategic errors 'over which conscientious attorneys might differ.'" (Citations omitted) 383 F.2d at 132.

It is difficult to differentiate *Maselli* from the cases in the second category in terms of the competence displayed by the various attorneys involved. What really distinguishes *Maselli,* I submit, is that in the second category of cases, counsel's ineptitude had no readily identifiable impact on the outcome of the proceedings. In *Maselli,* on the other hand, the consequences flowing from counsel's inadequacy were causally traceable: the court concluded that petitioner would have obtained a reversal of his conviction but for his lawyer's misfeasance. It would appear, then, that the court, in analyzing claims of Sixth Amendment deprivation, has looked not so much to the quality of the ineptitude as to its discernible consequences. This approach appears to flow from a principle which the court has frequenly articulated: "[i]n evaluating a claim of ineffective assistance of counsel, our Court usually has started by examining the strength of the prosecution's case." *United States ex rel. Marcelin* v. *Mancusi,* supra, at 43; *United States ex rel. Crispin* v. *Mancusi,* supra; *United States* v. *Garguilo,* supra; *United States* v. *Katz,* 425 F.2d 928 (2nd Cir. 1970). The weaker the prosecution's case, then, the more likely it is that the misfeasance will attain constitutional significance.

I therefore find myself compelled to conclude that the ineptitude displayed by petitioner's assigned appellate counsel did indeed deprive him of the effective assistance of counsel, in violation of his Sixth Amendment rights. To begin, as the case, it is plain that the evidence adduced against petitioner was scarcely overwhelming. As I have already noted, the state introduced no direct evidence of petitioner's participation in Chambers' fall from the roof; indeed, it produced no direct evidence of anything that transpired on the roof. The more relevant consideration, however, is the strength of the state's case on appeal. Consequently, this case resembles *Maselli* in one crucial respect: the petitioner would almost certainly have suc-

ceeded in obtaining a reversal of his conviction had it not been for his lawyer's misfeasance. The misfeasance here was not the product of neglect and indifference, as in *Maselli,* but resulted instead from sheer ignorance of the law. I do not however, regard that as a meaningful distinction, for the consequences to the defendants involved were identical.

Some consideration of the *Wight* "shock the conscience" test is perhaps in order at this juncture. I am, in all candor, appalled that the representation of a convicted murderer, facing a minimum of fifteen years in prison, should be entrusted to a lawyer whose acquaintance with criminal law is so slight as to be non-existent. Petitioner's claim comes at a time when the Chief Justice of the United States[14] and the Chief Judge of our circuit[15] and that of the District of Columbia[16] have drawn our attention to the problem of ineffective representation. The Chief Justice in particular has stressed the need for specialized training in trial and appellate advocacy. The assigned appellate counsel, competent though he may be in his chosen field of the law, was lamentably equipped to handle petitioner's case. If we continue to assume that all lawyers are omnicompetent generalists, our criminal courts will doubtless see more such "farces and mockeries of justice" as this.

V.

Because petitioner has only alleged the ineffective assistance of appellate counsel, the granting of the writ must do no more than restore his right to appeal. *United States ex rel. Nathaniel Williams* v. *LaVallee,* —— F.2d —— (2nd Cir., Nov. 20, 1973). The appropriate procedure, then, is to vacate the judgment of conviction and remand the petitioner for resentencing *nunc pro tunc* upon the verdict already rendered. The petitioner will then have the opportunity to prosecute another appeal. *United States ex rel.*

Thurmond v. *Mancusi*, 275 F.Supp. 508 (E.D.N.Y. 1967); *People* v. *Hairston*, 10 N.Y.2d 92 (1961). The judgment of the Supreme Court, Bronx County, is hereby vacated.

The court wishes to express it thanks to John J. Tigue, Jr., of the New York bar, who discharged his duties as assigned counsel with great credit to himself and the profession.

So Ordered.

Dated: January 30, 1974

Arnold Bauman
U. S. D. J.

Footnotes

[1] The original indictment, No. 187-69, returned in the Supreme Court, Bronx County, named Johnson, Thompson and Ford only.

[2] Cecil Luckie and William Van Hook, the state's principal witnesses at the trial, were apparently little more than disinterested observers. They did not know Chambers, bore no grudge against him, and, according to their own (uncontradicted) testimony, did not participate in the beating until Johnson drew a gun and announced that everyone had to be involved, "so nobody could squeal."

[3] It should also be noted that the force of petitioner's argument here is further diminished by Mrs. Lowe's admission that she was aware, at the time of the trial, of the substance of Ford's account of Chambers' death. She therefore made some attempt to interview Ford prior to trial, but Braunstein, Ford's counsel, steadfastly refused to permit her access to Ford. Never having spoken to Ford, she thus chose not to call him as a defense witness at trial.

[4] C.P.L. § 300.50:

"1. In submitting a count of an indictment to the jury, the court in its discretion may, in addition to submitting the greatest offense which it is required to submit, submit in the alternative any lesser included offense if there is a reasonable view of the evidence which would support a finding that the defendant committed such lesser offense but did not commit the greater. If there is no reasonable view of the evidence which would support such a finding, the court may not submit such lesser offense. Any error respecting such submission, however, is

waived by the defendant unless he objects thereto before the jury retires to deliberate.

2. If the court is authorized by subdivision one to submit a lesser included offense and is requested by either party to do so, it must do so. In the absence of such a request, the court's failure to submit such offense does not constitute error.

3. The principles prescribed in subdivisions one and two apply equally where the lesser included offense is specifically charged in another count of the indictment.

4. Whenever the court submits two or more offenses in the alternative pursuant to this section, is must instruct the jury that it may render a verdict of guilty with respect to any one of such offenses, depending upon its findings of fact, but that it may not render a verdict of guilty with respect to more than one. A verdict of guilty of any such offense is not deemed an acquittal of any lesser offense submitted, but is deemed an acquittal of every greater offense submitted."

[5] "Mrs. Lowe: Now, I also take exception to the charge of the Court when it referred to the intent and the common enterprise, it did not clearly state to this jury that they could not consider that the intent that resulted in the assault upon the deceased in the apartment or the common enterprise that may have given rise to the assault on the deceased in the apartment is the intent and common enterprise that must be found to convict these defendants of murder and in view of the fact that there is a—there is very strong proof that the defendants did engage in an assault pursuant to a common enterprise to find out from Chambers where the coat—where the things that were stolen from Ford's apartment, that that intent and that enterprise is not the intent and enterprise that is a requisite for finding guilt of murder and I believe the jury does not understand that and I request the Court to change the jury clearly that the intent necessary to act in concert to find out where Larry—where Perry Ford's clothing was and the result of the assault on Chambers inside that apartment should be clearly distinguished from an acting in concert for the purpose of murdering Perry Ford—I mean murdering Nicholas Chambers.

The Court: In summarizing the evidence, the Court summarized the testimony of all the witnesses and that is the testimony that is the evidence which this jury will deliberate upon and whatever occurred in the apartment prior to the time they left the apartment and started upstairs surely was an assault but all of that is merged in this circumstantial evidence and intent of the whole proceeding from beginning to

end and it's not like taking separate blocks and putting them all together and charging the separate blocks. You take all the blocks together as the evidence and charge—in charging the one crime. And I'm not going to charge separate counts here of assault because murder in itself is an assault with—and that's what I have before me.

Mrs. Lowe: I'm saying that the act that took place in the apartment an act of assault is not the assault that would merge in the homicide—

The Court: I decline to charge. First of all, there is no such charge in the indictment. I find anything that occurred prior to what you are talking about is not independent, it's merged in and part of the evidence to spell out intent, circumstantial evidence and the whole ball of wax leading up to acting in concert to commit a crime."

[6] This test has a wide following. See, e.g., *McMillan* v. *New Jersey*, 408 F.2d 1375 (3rd Cir., 1969); *Davis* v. *Bomar*, 344 F.2d 84 (6th Cir.), cert. denied, 383 U.S. 883 (1965); *Audett* v. *United States*, 265 F. 837 (9th Cir.), cert. denied, 361 U.S. 815 (1959). But see *Scott* v. *United States*, 427 F.2d 609 (D.C.Cir. 1970).

[7] See, e.g., *Adamson* v. *California*, 332 U.S. 46, 68 (1947); *Rochin* v. *California*, 342 U.S. 165, 174 (1952); *Griswold* v. *Connecticut*, 381 U.S. 479, 507 (1965) (all Black, J. dissenting); and Black, *A Constitutional Faith*, chapter 2 (New York, 1969).

[8] *United States* v. *Garguilo*, 324 F.2d 795 (2nd Cir. 1963); *United States ex rel. Walker* v. *Henderson*, —— F.2d —— (2nd Cir., January 7, 1974).

[9] *United States ex rel. Crispin* v. *Mancusi*, 448 F.2d 233 (2nd Cir.), cert. denied, 404 U.S. 967 (1971).

[10] *United States* v. *Garguilo*, supra.

[11] *United States ex rel. Walker* v. *Henderson*, supra.

[12] *United States* v. *Wight*, supra.

[13] *United States* v. *Sanchez*, 483 F.2d 1052 (2nd Cir. 1973).

[14] Burger, "The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice? 42 Fordham L. Rev. 227 (1973).

[15] Kaufman, 170 New York Law Journal No. 90, p. 5 (Dec. 7, 1973).

[16] Bazelon, "The Defective Assistance of Counsel", 42 U. Cin. L. Rev. 1 (1973).

Notice of Appeal.

SIRS:

PLEASE TAKE NOTICE that respondent, Leon J. Vincent, Superintendent of Green Haven Correctional Facility, hereby appeals to the United States Court of Appeals for the Second Circuit from an order of this Court, dated January 30, 1974, vacating petitioner's judgment of conviction and remanding him for resentence *nunc pro tunc* so that he may prosecute another direct appeal, and from each and every part of said order.

Dated: New York, New York, February 28, 1974.

Yours, etc.,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent

By LILLIAN Z. COHEN
LILLIAN Z. COHEN
Assistant Attorney General

To: CLERK
United States District Court
Southern District of New York

JOHN J. TIGUE, JR., Esq.

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April 1, 1924

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Atty. J. J. Tigue